

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BILL OGAN,

Plaintiff,

v.

MATTHEW MILHOLLAND and  
DAVID INCH,

Defendants.

NO. CV-06-317-RHW

**ORDER OF DISMISSAL**

By previous order, the Court directed Plaintiff to show cause why the above-captioned matter should not be dismissed for failure to prosecute. A telephonic hearing on this matter was held on February 24, 2010. Plaintiff appeared *pro se*; Defendants were represented by Robert Binger.

The Court's previous orders set forth the procedural history of the case, including Plaintiff's numerous failures to comply with Court-ordered deadlines and the numerous continuances the Court has granted upon Plaintiff's motion. When a party fails to comply with a Court order, Fed. R. Civ. P. 37(b)(2) sets forth a number of sanctions available to the Court, including "dismissing the action or proceeding in whole or in part." The Court may also dismiss a matter under Fed. R. Civ. P. 41(b) for failure to prosecute. The Court must consider five factors in determining whether dismissal is appropriate: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1226

1 (9th Cir. 2006). The Court finds that these factors weigh in favor of dismissal here.

2 First, it is clear that Plaintiff's failures to comply with Court-ordered  
3 deadlines have unreasonably delayed the prosecution of this case. The case has  
4 been pending for over three years. It has now been over a year since the Court  
5 permitted appointed counsel to withdraw, and Plaintiff has taken no substantive  
6 action to advance his case during that time. In August 2009, the Court continued  
7 the trial for six months, until March 22, 2010, and warned Plaintiff that any failures  
8 to comply with the amended Scheduling Order may result in dismissal of the case  
9 (Ct. Rec. 133). Plaintiff has since failed to comply with all pretrial deadlines,  
10 including filing and serving exhibit and witness lists (February 2, 2010); filing  
11 objections to Defendants' witness and exhibit lists (February 9, 2010); filing  
12 motions in limine (February 9, 2010); designating deposition testimony (February  
13 2, 2010); and filing a joint pretrial order (February 19, 2010). Defense counsel also  
14 declares that Plaintiff failed to confer with him regarding the preparation of a joint  
15 pretrial order (Ct. Rec. 169).

16 Plaintiff moves the Court to continue his trial date again, this time because  
17 he has entered inpatient drug treatment while incarcerated and believes he will  
18 have no access to a law library. With great sincerity, the Court applauds Plaintiff's  
19 decision to enter treatment and get his life back on track, and the Court wishes  
20 Plaintiff nothing but success in those endeavors. However, Plaintiff's participation  
21 in a treatment program does not justify his wholesale failure to comply with  
22 pretrial deadlines. Indeed, Plaintiff has filed at least eight documents since he  
23 entered inpatient treatment (Ct. Recs. 160-65, 167, 170, and 171), none of which  
24 identify the basic information (such as witnesses and exhibits) necessary to try this  
25 case. At the hearing on this matter, Plaintiff still could not identify any witnesses  
26 he planned to call or exhibits he planned to produce. Given the lengthy history of  
27 this case and the Court's repeated warnings to Plaintiff in the past, the Court  
28 cannot excuse these failures.

1 Second, just as with the first factor, “delay in reaching the merits, whether  
2 by way of settlement or adjudication, is costly in money, memory, manageability,  
3 and confidence in the process.” *Id.* at 1227. Plaintiff’s unjustified failures to  
4 participate have made this case unmanageable and have unreasonably wasted the  
5 Court’s resources.

6 Third, prejudice to Defendant is presumed where, as here, a party  
7 unreasonably delays the process and fails to produce documents as ordered. *Id.* at  
8 1227-28. Late tender of required documents is no excuse. *Id.* Because Plaintiff has  
9 not rebutted the presumption of prejudice, this factor weighs conclusively in favor  
10 of dismissal.

11 The fourth factor “lends little support to a party whose responsibility it is to  
12 move a case toward disposition on the merits but whose conduct impedes progress  
13 in that direction.” *Id.* at 1228. By his actions, Plaintiff has unreasonably prevented  
14 this case from proceeding to the merits, and therefore he gains little benefit from  
15 this factor.

16 Finally, Plaintiff’s failures to comply despite the Court’s warning that such  
17 failures would lead to dismissal shows that less drastic alternatives would be  
18 ineffective. The Court already explored less drastic sanctions by allowing Plaintiff  
19 several continuances in light of his *pro se* status and circumstances. Nonetheless,  
20 this case is no closer to trial than it was over a year ago. In the face of Plaintiff’s  
21 failure to participate in the process, the Court sees no alternative to dismissal.

22 Accordingly, **IT IS HEREBY ORDERED:**

- 23 1. Plaintiff’s Motion to Continue (Ct. Rec. 162) is **DENIED**.  
24 2. The above-captioned matter is **dismissed with prejudice**.

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1       **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
2 Order, forward copies to counsel and Plaintiff, and **close the file.**

3       **DATED** this 1<sup>st</sup> day of February, 2010.  
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5                               *s/Robert H. Whaley*  
6                               **ROBERT H. WHALEY**  
7                               United States District Judge

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